

UNPUBLISHED

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
BIG STONE GAP DIVISION**

UNITED STATES OF AMERICA

v.

RICHARD CHARLES NORTON,

Defendant.

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Case No. 2:99CR10078

OPINION

By: James P. Jones
United States District Judge

Sharon Burnham, Assistant United States Attorney, Roanoke, Virginia, for United States of America; R. Neal Keese, Jr., and Kevin S. Blair, Woods, Rogers & Hazlegrove, P.L.C., Roanoke, Virginia, for Cynthia K. Norton.

The question in this criminal case is whether the government can forfeit the defendant's accrued pension plan benefits and individual retirement account, both of which were assigned to his spouse in a divorce decree. I hold that the pension plan benefits are not subject to forfeiture, but the IRA is.

I

Richard Charles Norton, a physician, was convicted by a jury in this court of offenses relating to his dealings with a local hospital. Count Eight of the Indictment charged him with engaging in a money laundering conspiracy with a co-defendant,

in violation of 18 U.S.C.A. § 1956(h) (West 2000 & Supp. 2002). The government asserted that the conspiracy, which lasted from 1992 until 1999, had as its object the concealment of a scheme by which Dr. Norton received approximately \$3.7 million from contracts with the hospital and in return paid the co-defendant, the hospital CEO, kickbacks of over \$800,000.¹

Count Twenty-One of the Indictment sought forfeiture of certain assets of Norton and his co-defendant by virtue of the money laundering conspiracy, pursuant to 18 U.S.C.A. § 982 (West 2000 & Supp. 2002), the general criminal forfeiture statute. The property sought to be forfeited from Dr. Norton included the following:

Contents of one SEP Plan Trust account in the name of Richard Charles Norton, Account No. FAP-008567, First American Bank; and

Contents of one trust account (pension plan) in the name of Richard Norton M.D., Account No. 6051053, First Tennessee Bank.

(Indictment, Count Twenty-One ¶ (2)(b)(4), (5).)

After return of the Indictment on November 18, 1999, the government obtained ex parte a Protective Order restraining the transfer of the assets sought to be forfeited, pursuant to 21 U.S.C.A. § 853(e) (West 2000 & Supp. 2002),² including the accounts

¹ The co-defendant, James Davis, pleaded guilty and testified against Dr. Norton at trial.

² In imposing sentence following conviction under 18 U.S.C.A. § 1956, the offense charged in Count Eight, the court is authorized to order forfeiture of any property involved in the offense or traceable to such property. *See* 18 U.S.C.A. § 982(a)(1). Section 982 incorporates the provisions for criminal forfeiture provided in 21 U.S.C.A. § 853, part of the Comprehensive Drug Abuse

described above, which will hereafter be referred to respectively as the SEP Account and the Pension Plan Account. The court thereafter modified the Protective Order on several occasions, including the partial release of an office building owned by Dr. Norton and his wife, so that they could obtain a loan to finance his legal defense costs. *See United States v. Norton*, No. 2:99CR10078 (W.D. Va. Feb. 10, 2000).

Dr. Norton was convicted by a jury on August 29, 2000, of all of the substantive counts of the Indictment. After return of this verdict, he waived a jury determination of the forfeiture count, and the parties agreed that the court would later determine all matters relating to forfeiture. At sentencing on November 16, 2000, the government did not request the forfeiture of any specific property, but asked for a money judgment in forfeiture. Accordingly, the court ordered forfeiture of \$800,581.64 as part of the defendant's sentence. In addition, the court ordered restitution to the hospital in the same amount, a fine of \$25,000, a special assessment of \$700, and imprisonment for sixty months.

Dr. Norton appealed and the court of appeals affirmed the convictions on all counts except Count One for racketeering in violation of 18 U.S.C.A. § 1962(c) (West 2000). That conviction was set aside and the case was remanded for re-sentencing.

Prevention and Control Act of 1970, and provides that “[t]he forfeiture of property under this section, including any seizure and disposition of the property and any related judicial or administrative proceeding, shall be governed by [§ 853].” 18 U.S.C.A. § 982(b)(1).

See United States v. Norton, 17 Fed. Appx. 98, 102 (4th Cir. 2001) (unpublished), *cert. denied*, 122 S. Ct. 843 (2002). The elimination of the racketeering count made no difference in the defendant's sentencing guideline range and at re-sentencing on November 19, 2001, the same sentence was imposed, except that the special assessment was reduced to \$600, reflecting the reduction of the number of counts of conviction, and, at the request of the defendant, and because of his deteriorated financial condition, the fine of \$25,000 was omitted.

Following re-sentencing, on December 10, 2001, Norton and his wife, Cynthia, were divorced in Tennessee, where they resided. As part of the divorce decree, the state court directed that the SEP Account, with a balance of approximately \$30,000, and the Pension Plan Account, with a balance of approximately \$205,000, be awarded to Mrs. Norton, one-half to be her property outright and the remaining one-half to be held in trust by her for the Nortons' five minor children. (Norton Ex. 5, at 2-3.) Mrs. Norton thereafter petitioned this court to release these accounts from the Protective Order. The government objected and instead requested the court to enter an order forfeiting the accounts as substitute assets, with the agreement that following forfeiture, Mrs. Norton might appropriately assert her interest in the accounts for determination by this court. Accordingly, on April 15, 2002, a First Order of Substitute Assets was entered forfeiting the accounts to the United States. The order

provided that Mrs. Norton would be afforded an opportunity to file a petition asserting her third party interest in the property pursuant to 21 U.S.C.A. § 853(n), which the court would then adjudicate.

Mrs. Norton filed her petition under § 853(n) on May 14, 2002, in her own right and as guardian for her minor children. An evidentiary hearing on the petition was held on August 6, 2002. Prior to the hearing the parties filed briefs in support of their respective positions, and the issues are now ripe for decision.³

II

The facts concerning the property in question are not in dispute. On December 15, 1993, Richard Norton, M.D., P.C., the professional corporation of which Dr. Norton was an employee, adopted a defined contribution retirement plan with First Tennessee Bank of Johnson City, Tennessee, as trustee. The name of the plan is the Richard Norton, M.D., P.C., Pension Plan. The Pension Plan Account of approximately \$205,000 represents Dr. Norton's accrued vested benefit in this pension plan. The Master Plan and Trust Agreement provides, in paragraph 8.05, as

³ Dr. Norton appealed his re-sentencing and the court of appeals recently affirmed. *See United States v. Norton*, No. 01-4957 (4th Cir. Aug. 30, 2002) (unpublished). In any event, a district court has jurisdiction over the forfeiture of substitute property even after an appeal has been taken of the original judgment of forfeiture. *See United States v. Hurley*, 63 F.3d 1, 23-24 (1st Cir. 1995).

follows:

ASSIGNMENT OR ALIENATION. Subject to Code §414(p) relating to qualified domestic relations orders, neither a Participant nor a Beneficiary may anticipate, assign or alienate (either at law or in equity) any benefit provided under the Plan, and the Trustee will not recognize any such anticipation, assignment or alienation. Furthermore, a benefit under the Plan is not subject to attachment, garnishment, levy, execution or other legal or equitable process.

(Norton Ex. 1, at 54.)

The SEP Account was established by Dr. Norton individually on August 3, 1993, with First American Bank in Nashville, Tennessee. A simplified employee pension or SEP plan is a type of individual retirement account recognized by the Internal Revenue Service, characterized by ease of adoption and administration. *See* I.R.C. § 408(k) ; 4 *Empl. Coordinator* ¶ B-22,201 (West 2002). The SEP Account of approximately \$30,000 represents Dr. Norton's accrued vested benefit in his SEP plan.

Mrs. Norton contends that the Pension Plan Account and the SEP Account are not subject to forfeiture for two reasons: 1) Because of the provisions of the Employee Retirement Income Security Act of 1974 ("ERISA") which forbid alienation of pension benefits; and 2) Because of her state law marital rights in the

property. The government argues to the contrary.⁴

III

ERISA states that “[e]ach pension plan shall provide that benefits provided under the plan may not be assigned or alienated.” 29 U.S.C.A. § 1056(d)(1) (West 1999). However, exceptions are specifically made for assignments pursuant to a “qualified domestic relations order” such as contained in the Nortons’ divorce decree, and for judgments, criminal or civil, arising from a violation of ERISA obligations. *See id.* § 1056(d)(3), (4). The Internal Revenue Code requires that qualified pension trusts contain specific language prohibiting alienation. *See* I.R.C. § 401(a)(13). The Treasury Department has adopted a regulation in accord with the statute that states in part as follows:

Under Section 401(a)(13) [of the Internal Revenue Code], a trust will not be qualified unless the plan of which the trust is a part provides that benefits provided under the plan may not be anticipated, assigned (either

⁴ The government initially contends that Mrs. Norton’s claims should have been raised by Dr. Norton before forfeiture. (Gov’t Opp’n at 4.) However, the First Order of Substitute Assets was entered without an opportunity for Dr. Norton to object. Dr. Norton had already assigned his interest in the property to Mrs. Norton as part of the divorce settlement, and the controversy was between Mrs. Norton and the government at the time the First Order of Substitute Assets was entered. Indeed, the Order, drafted by counsel for the government, expressly provides that Mrs. Norton will be given an opportunity to obtain an adjudication of her rights. (First Order of Substitute Assets at 3.) If the government now seriously contends that Mrs. Norton is without standing to make her present arguments, the only proper course would be to vacate the First Order of Substitute Assets and allow Dr. Norton to appear and assert these arguments.

at law or in equity), alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process.

Treas. Reg. § 1.401(a)-13(b)(1).⁵

These provisions mean that “an employee’s accrued benefits under . . . a qualified plan may not be reached by judicial process in aid of a third-party creditor.” *Tenneco Inc. v. First Va. Bank of Tidewater*, 698 F.2d 688, 689 (4th Cir. 1983). Indeed, there is no “generalized equitable exception—either for employee malfeasance or for criminal misconduct—to ERISA’s prohibition on the assignment or alienation of pension benefits.” *Guidry v. Sheet Metal Workers Nat’l Pension Fund*, 493 U.S. 365, 376 (1990). Anti-alienation of pension funds “reflects a considered congressional policy choice, a decision to safeguard a stream of income for pensioners (and their dependants, who may be, and perhaps usually are, blameless), even if that decision prevents others from securing relief for the wrongs done them.” *Id.*

Based on this authority, I agree with Mrs. Norton that the anti-alienation provisions of federal law protect the Pension Account from forfeiture. The Fourth

⁵ Pension plans may be subject to both ERISA and the Internal Revenue Code. ERISA provides certain substantive enforceable rights regarding such plans, and the Code offers tax advantages for their use. A “qualified plan” is an employee benefit plan, including a pension plan, that meets the “tax qualifications” of the Code. See 1 Ronald J. Cooke, *ERISA Practice & Procedure* § 1:3 (2d ed. 1996). There appears to be no question but that the Richard Norton, M.D., P.C., Pension Plan is so qualified.

Circuit has held that pension funds—even after distribution to the beneficiary—are protected from a restitution order in a criminal case. *See United States v. Smith*, 47 F.3d 681, 683 (4th Cir. 1995). There is no good reason that forfeiture should be treated differently. *See United States v. Parise*, No. 96-273-01, 1997 WL 431009, at *2 (E.D. Pa. July 15, 1997) (holding that pension plan benefits are not subject to forfeiture in criminal case).⁶

Moreover, in the present case the Pension Account is substitute property. The government has never shown that the Pension Account is composed of funds involved in the money laundering offense of which Dr. Norton was convicted. Thus, the government’s concern that acceptance of the petitioner’s position will allow “convicted criminals to keep the proceeds from their wrongs” (Gov’t Opp’n at 14) is misplaced.

However, a different analysis applies to the SEP Account. ERISA and its anti-alienation provisions do not apply to individual retirement accounts. *See United States v. Infelise*, 159 F.3d 300, 304 (7th Cir. 1998). While the Internal Revenue Code provides that the interest in an individual retirement account must be

⁶ The government relies on *United States v. Rice*, 196 F. Supp. 2d 1196, 1200 (N.D. Okla. 2002), which held that ERISA did not prevent garnishment of a defendant’s pension benefits by the government in order to enforce a criminal fine. The court in that case, however, relied upon the criminal fine statute, 18 U.S.C.A. § 3613 (West 2000), which, by reference to the Internal Revenue Code, specifically limited the property of a debtor exempt from enforcement. *See id.* The forfeiture statute involved here includes no such provision.

“nonforfeitable,” I.R.C. § 408(a)(4), that means only that the account must be vested in its owner, and it does not prevent criminal forfeiture to the government. *See id.* Thus, unlike the Pension Account, ERISA does not prevent the SEP Account from being subject to forfeiture.

Finally, Mrs. Norton argues that her state law marital rights in the SEP Account trumps the government’s forfeiture. However, she had only an inchoate interest in the property before the divorce decree, no different than any other creditor. *See State v. Gatlin*, 1999 WL 77847, at *2 n.1 (Tenn. Ct. App. Feb. 19, 1999) (“Division of marital property under Tenn. Code Ann. § 36-4-121 governs only the division of assets upon divorce, not the determination of property ownership between married persons.”). The divorce decree was entered after the Indictment and the Protective Order specified that the SEP Account was subject to forfeiture. Thus, Mrs. Norton took her interest subject to the government’s forfeiture claim.⁷

⁷ The statute provides that forfeiture relates back to the time of commission of the crime of conviction insofar as third party interests in the property are concerned. *See* 21 U.S.C.A. § 853(c). Some courts have held that this “relation back” doctrine does not apply to substitute property under § 853(p). *See United States v. Saccoccia*, 165 F. Supp. 2d 103, 113 (D.R.I. 2001). However, the Fourth Circuit has viewed substitute property differently. *See In re Billman*, 915 F.2d 916, 921 (4th Cir. 1990) (holding that substitute assets are subject to pretrial restraint). Nevertheless, even if the government’s claim did not relate back to the time of Dr. Norton’s crime, it is not unfair for it to relate back to the date of public notice of the government’s intent to obtain forfeiture. *See* 2 David B. Smith, *Prosecution & Defense of Forfeiture Cases* ¶ 13.02, at 13-42 (2002).

IV

In summary, I hold that Dr. Norton's Pension Account is not subject to forfeiture and belongs to Mrs. Norton under the terms of the divorce decree but that the SEP Account was properly forfeited to the government and that Mrs. Norton is without a valid claim to it.

A separate judgment consistent with this opinion is being entered herewith.

DATED: September 3, 2002

United States District Judge